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# The Creativity of the Common-Law Judge: The Jurisprudence of William Mitchell

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**THE CREATIVITY OF THE COMMON-LAW JUDGE:  
THE JURISPRUDENCE OF WILLIAM MITCHELL**

Charles J. Reid, Jr.<sup>†</sup>

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I. INTRODUCTION

Of William Mitchell’s contributions to the life of the law in America, James Bradley Thayer could write in 1900: “On no court in the country to-day is there a judge who would not find his peer in Judge Mitchell. That he has been considered in the highest circles for the bench of the Supreme Court is, I dare say, as known to you as it is to me.”<sup>1</sup> Thayer, professor of law at Harvard and one of the great legal minds of his time, acknowledged that “I have long

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1. Edwin James Jaggard, *William Mitchell 1832-1900*, 8 GREAT AMERICAN LAWYERS 387, 398 (William Draper Lewis ed., Rothman Reprints 1971) (1909) (quoting James Bradley Thayer).

recognized Judge Mitchell as one of the best judges in this country . . . .”<sup>2</sup>

Mitchell, of Scottish ancestry and Canadian birth, arrived in the United States in 1850 to study at Jefferson (now Washington and Jefferson) College.<sup>3</sup> At college, he received a strongly Calvinist education that emphasized logic and moral grounding.<sup>4</sup> Although his religious convictions would shift and he eventually abandoned formal membership in the Presbyterian Church, he remained very much what we would call today a “cultural Puritan.”<sup>5</sup> Significantly, even after dropping formal affiliation with the Church, Mitchell “taught Bible class at the First Presbyterian Church of Winona.”<sup>6</sup>

Mitchell’s presence graced the Minnesota Supreme Court for nearly nineteen years, from 1881 to 1900.<sup>7</sup> His output was prodigious. He produced nearly 1600 judicial opinions.<sup>8</sup> It has been estimated “that excluding Sundays, and allowing a month in each year for vacation, Judge Mitchell wrote one opinion in every three days for nineteen years.”<sup>9</sup> Indeed, “[i]n point of numbers, his opinions exceed those of any other justice of the Supreme Court of his state, or the nation.”<sup>10</sup> It is one aspect, perhaps the central aspect, the unifying theme of this prolific body of work, that is the focus of this essay: William Mitchell’s commitment to the basic principles and methodology of common-law jurisprudence.

## II. WILLIAM MITCHELL: HIS COMMON-LAW JURISPRUDENCE IN CONTEXT

William Mitchell’s career coincided with the period of the greatest flourishing of the common law in American legal history. In whichever direction one turned, one was likely to encounter a great commentator on the common law or a great judge working

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2. *Id.*

3. *Id.* at 387.

4. *Id.* at 388. “The college facilities were limited. Its curriculum was narrow; its atmosphere surcharged with the Calvinism of the ‘unspeakable Scot’ [John Knox]; but the mental drill was exacting and thorough; the moral discipline severe and exalting.” *Id.*

5. *See id.* at 395-96. As his biographer put it: “His Scotch loyalty preserved his association with the Presbyterians . . . .” *Id.*

6. *Justice William Mitchell: A Centennial Tribute*, 7 WM. MITCHELL L. REV. 5, 10 (1981).

7. *Id.* at 11-13.

8. *See* Jaggard, *supra* note 1, at 426.

9. *Id.* at 425.

10. *Id.* at 427.

within that tradition. There was Joel Prentiss Bishop, author of multiple treatises on various aspects of the common law, who was perhaps the greatest of the nineteenth-century treatise writers.<sup>11</sup> In his own day, Bishop was probably at least as influential, where the broad mass of practitioners was concerned, as Oliver Wendell Holmes.<sup>12</sup> There was James Coolidge Carter, who “was perhaps the most respected appellate advocate in the nation.”<sup>13</sup> “As a jurisprudential writer, Carter was the preeminent American champion of historical jurisprudence . . . ,”<sup>14</sup> upon which he drew to advocate on behalf of the singular importance of an unwritten, evolving common law to the development of the American legal order.<sup>15</sup>

There was also Thomas Cooley, another of the great treatise writers of the day and a leading judge. His treatise on constitutional limitations, G. Edward White has observed, provided an important intellectual support for the growth of theories of substantive due process, though Cooley shied away from such general terminology.<sup>16</sup> There was Charles Schuster Zane, the Chief Justice of the Utah Territorial Supreme Court, who is considered even today to be the founder of Utah law.<sup>17</sup> There was also Charles Zane’s son, John Maxcy Zane, another notable treatise-writer and commentator on the law, as well as prominent Utah and Chicago lawyer.<sup>18</sup>

This whole way of thinking about the law was still in full vigor in the early years of the twentieth century. Benjamin Cardozo, in many respects, represents its final flowering. An opinion like *McPherson v. Buick Motor Co.* is an outstanding example of his deft

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11. See generally Stephen A. Siegel, *Joel Bishop’s Orthodoxy*, 13 LAW & HIST. REV. 215 (1995).

12. See *id.* at 217. Siegel has written: “Bishop may be more representative of the mass of nineteenth-century middle-class lawyers than the [elites of the Harvard Law School faculty].” *Id.*

13. Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 LAW & HIST. REV. 577, 578 (2002).

14. *Id.*

15. *Id.* at 579.

16. G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 118-19* (New York: Oxford University Press 1976) (referring to T. COOLEY, *A TREATISE ON CONSTITUTIONAL LIMITATIONS* 355 (1868)).

17. See Thomas G. Alexander, *Charles S. Zane: Apostle of the New Era*, 34 UTAH HIST. Q. 290 (1966); John Maxcy Zane, *A Rare Judicial Service: Charles S. Zane*, 19 J. ILL. STATE HIST. SOC’Y. 31 (1926).

18. See Charles J. Reid, Jr., *Foreword* to JOHN MAXCY ZANE, *THE STORY OF LAW*, ix, ix-xxiii (2d ed. 1998).

use of precedent within the common-law framework.<sup>19</sup> Cardozo's view of the role of the common-law judge as artist is a view that would have resonated with nineteenth-century judges like William Mitchell.

Now, what were the main premises of this common-law tradition? Its jurisprudence, as already intimated, can best be described by the term "historical jurisprudence." The term "historical jurisprudence" itself is no longer much in use, although we still employ the fruits of this method of reasoning when we have recourse to the doctrine of precedent, or employ such metaphors as the evolution, or growth, or development of legal doctrines from certain principles. It does well to bear in mind that not every legal order perceives law as an evolutionary enterprise. That we tend to use such terms unreflectively, almost as second nature, is testimony to the hold that historical jurisprudence has over us still.

In its origins, this way of viewing the law can be traced to seventeenth-century England and the thought-world of the great English common lawyers, Sir Edward Coke, Sir John Selden, and Sir Matthew Hale.<sup>20</sup>

These English lawyers were believers in a natural law—a transcendent law ultimately of divine origin which established norms of right and wrong and governed the affairs of nations. Matthew Hale thus saw the hand of providence in human affairs, "to the point where a falling stone or a parish boundary were seen to manifest the will of God."<sup>21</sup> They also believed in a positive law, the statute-law of the temporal realm, valid by reason of enactment by king and parliament.<sup>22</sup> Thus Matthew Hale included among the sources of law "[t]he authority of Parliament to make law," and "[t]he judicial decisions of courts of justice."<sup>23</sup>

But these English lawyers also believed, in a way that their predecessors had not, in a way, I fear, that we sometimes do not, in

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19. 111 N.E. 1050 (N.Y. 1916). Justice Cardozo used precedent to determine that an automobile company had a strict duty with respect to faulty wheels purchased from a third party company due to the nature of the business. *Id.*

20. See Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651 (1993).

21. ALAN CROMARTIE, *SIR MATTHEW HALE, 1609-1676: LAW, RELIGION, AND NATURAL PHILOSOPHY* 235 (1995). For examples of how this view of providence affected his judging, see generally Maija Jansson, *Matthew Hale on Judges and Judging*, 9 J. LEGAL HIST. 201 (1988) (reprinting portions of Matthew Hale's diary).

22. See Berman, *Origins*, *supra* note 20, at 1720-21.

23. JOHN HOSTETTLER, *THE RED GOWN: THE LIFE AND WORKS OF SIR MATTHEW HALE* 190 (2002).

the normative significance of the past.<sup>24</sup> Historical jurisprudence, on this account, is the recognition that law is the product, at least in part, of the distinct historical experiences of the political community. The distinctive history of nations and peoples conditioned the sorts of law each nation would have. Society, as Edmund Burke observed, was a covenant among the generations—the past, the present, and those generations yet unborn.<sup>25</sup> Law, continuous over time, faithful to first principles, reflective of the received wisdom of the ages, was the bond that held the generations together.<sup>26</sup>

The English common law, on this analysis, was the product of the distinct historical experiences of the English people.<sup>27</sup> Its existence, at least to the common lawyers who gave it shape and substance, was seen as a gradual, almost providential, unfolding of history. England, seen as a kind of chosen people, was thus understood by English jurists as blessed with a legal order that fitted its needs as a free and commercial people.<sup>28</sup>

The three greatest historical jurists of the seventeenth century, the three lawyers responsible for the development of this conceptual apparatus—Coke, Selden, and Hale—understood the legal reasoning that accompanied this legal order as a type of “artificial reason,” by which they meant not that it was in some way false or merely pretence, but rather that it was the product of art—the result of human handiwork.<sup>29</sup> And this handiwork was necessarily historical. As Sir Edward Coke wrote:

[R]eason is the life of the law, nay the common law itself is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation and experience, and not of every man's natural reason; for *Nemo nascitur artifex*. This legal reason *est summa ratio*. And therefore if all the reason that is dispersed into so many several heads were united into

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24. See Berman, *Origins*, *supra* note 20, at 1655.

25. See Bruce P. Frohnen, *Multicultural Rights? Natural Law and the Reconciliation of Universal Norms With Particular Cultures*, 52 CATH. U. L. REV. 39, 59-60 (2002) (citing EDMUND BURKE, *Essay Towards a History of the Laws of England*, in 6 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 413, 416 (Bohn ed. 1854)).

26. *Id.* at 60.

27. See Berman, *Origins*, *supra* note 20, at 1733.

28. *Id.* at 1722.

29. *Id.* at 1689. Cf. Charles Gray, *Reason, Authority, and Imagination: The Jurisprudence of Sir Edward Coke*, in CULTURE AND POLITICS FROM PURITANISM TO THE ENLIGHTENMENT 25, 30-31 (Perez Zagorin ed. 1980).

one, yet could he not make such a law as the law of England is; because by many succession of ages it hath been fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection for the government of this realm, as the old rule may be justly verified of it, *Neminem oportet esse sapientiolem legibus*: No man out of his own private reason ought to be wiser than the law, which is the perfection of reason.<sup>30</sup>

The best of the English lawyers appreciated that the common law was not unchanging. But, they argued, it evolved in a way that was faithful to its first premises.<sup>31</sup> Thus, for instance, Sir Matthew Hale could write:

[T]hough those particular variations and accessions have happened in the laws, yet they being only partial and successive, we may with just reason say, they are the same English laws now, that they were 600 Years since in the general . . . [just] as Titius is the same man he was 40 years since, though physicians tell us, that in a tract of seven years, the body has scarce any of the same material substance it had before.<sup>32</sup>

The method the English common lawyers employed to analyze the law—it seems almost uniquely adapted to a historical view of legal development—was the doctrine of precedent. We who work within the common-law tradition take the doctrine of precedent for granted. It would come as a surprise, I think, to most American legal scholars to realize that most European systems have traditionally lacked a strong notion of precedent. To be sure, the French rely upon *jurisprudence*—the “teaching” of the courts,<sup>33</sup> while the courts of canon law in Rome look to *stylus* or *praxis*—the settled practice of the courts.<sup>34</sup> But reliance on teaching and customary practice does not constitute reasoning by precedent in the fashion

30. Dillard Boyer, “Understanding, Authority, and Will”: *Sir Edmund Coke and the Elizabethan Origins of Judicial Review*, 39 B.C. L. REV. 43, 44 (1997) (quoting SIR EDWARD COKE, COMMENTARY UPON LITTLETON 97b (Charles A. Butler ed., Legal Classics Library 1985) (1628)).

31. Berman, *Origins*, *supra* note 20, at 1713.

32. *Id.* (quoting MATHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 40 (Charles M. Gray ed., 1971) (3d ed. 1739) (spelling modernized)).

33. See André Tunc, *Methodology of the Civil Law in France*, 50 TUL. L. REV. 459, 462-68 (1976).

34. JOHN T. NOONAN, JR., POWER TO DISSOLVE: LAWYERS AND MARRIAGES IN THE COURTS OF THE ROMAN CURIA 27 (1972).

that is practiced within the Anglo-American tradition.

In fact, by the seventeenth century, the English lawyers had come to make use of a theory of precedent that historians now call “traditionary.”<sup>35</sup> In operation, this doctrine of precedent bore greater resemblance to its Continental counterparts than to the strict doctrine of precedent that rose to prominence in the nineteenth century and in modified form remains with us today.<sup>36</sup>

“[P]erhaps the first recorded use of the term ‘precedent’” occurred in 1557, in a case where “it was said that judgment was given ‘notwithstanding two presidents.’”<sup>37</sup> In 1673, a little more than one hundred years later, one sees Chief Justice John Vaughan of the Court of Common Pleas distinguish between the court’s holding and sayings of the Court that were extraneous, which Vaughan labeled “*gratis dictum*.”<sup>38</sup> It is the holding that we should be concerned with identifying, Vaughan admonished his readers, and dicta which we are free to ignore.<sup>39</sup>

Until about the year 1800, however, it was not, as Lord Mansfield put it in 1762, “the letter of particular precedents” that made law, but “[t]he reason and spirit of cases.”<sup>40</sup> The judge, on this analysis, remained responsible for discerning whether prior case law was sound, reasonable, and congruent with the first principles of the legal order.<sup>41</sup>

Gradually, however, with the dissemination and triumph of theories of legal positivism, made popular in the first third of the nineteenth century by scholars like John Austin and Jeremy Bentham, a strict doctrine of precedent became an intellectually coherent possibility.<sup>42</sup> The strict doctrine, as any first-year law student knows, looks to whether a particular precedent is “on all fours” with the present case.<sup>43</sup> Where such a match could be identified, the court is bound by the principle of stare decisis and is

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35. Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 449 (1996); H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949, 969 (1993).

36. See Berman & Reid, *supra* note 35, at 449; Powell, *supra* note 35, at 969-71.

37. See Berman & Reid, *supra* note 35, at 446 (quoting CARLETON KEMP ALLEN, *LAW IN THE MAKING* 204 (7th ed. 1964)).

38. *Id.* at 447 (quoting *Bole v. Horton*, 124 Eng. Rep. 1113, 1124 (K.B. 1673)).

39. *Id.*

40. *Id.* at 449 (quoting *Fisher v. Prince*, 97 Eng. Rep. 876, 876 (K.B. 1762)).

41. See Gerald J. Postema, *Some Roots of the Notion of Our Precedent*, in *PRECEDENT IN LAW* 9, 16-17 (Laurence Goldstein ed. 1987).

42. See Berman & Reid, *supra* note 35, at 449, 514-15.

43. *Id.* at 514.

not free to vary from the prior holding.<sup>44</sup>

The common-law system of reasoning, with its reliance on historical tradition and on precedent—in both its traditional and more modern epiphanies—was intended to promote adaptive change within the boundaries of established prior opinions. James Coolidge Carter, for instance, argued on behalf of the creative role of precedent by pointing to the “condition of constant change” that characterizes the “complicated societies” of his day.<sup>45</sup> It is better, Carter argued, that courts, not legislatures, take the lead in the reform of the law, since courts have the tradition of the common law upon which to draw, and can thus render decisions in accord with the traditions of the country and narrowly tailored to meet social needs.<sup>46</sup>

It thus belonged to the common-law judge, Carter asserted, taking account of precedent, looking to “the ordinary ways in which the business, the intercourse, and the conduct of life are conducted,” “to *find* the *best* rule by which the case may be determined.”<sup>47</sup> Carter’s emphasis of the words “find” and “best” indicated the creative role he expected the judge to play. Like Sir Edward Coke, like Sir Matthew Hale, Carter expected his judge to have long experience in the law and to be able to employ its principles creatively, adaptively, and faithfully, when confronted with novel questions and circumstances.<sup>48</sup> This was the thought-world in which William Mitchell moved and the vision of the common law that we can safely say he endorsed.

### III. JUSTICE WILLIAM MITCHELL: THE CREATIVE USE OF COMMON-LAW PRINCIPLES

With this as background, we can now consider the tradition and the thought-world within which Justice Mitchell operated, and the ways in which that thought-world influenced his own work as a judge. His position as a prolific justice on the Supreme Court of a state only recently admitted to the Union at the time of his elevation to the bench conferred on him exceptional latitude in looking to the whole of the common-law tradition for guidance.

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44. *Id.*

45. JAMES COOLIDGE CARTER, LAW: ITS ORIGIN, GROWTH, AND FUNCTION 172 (1907).

46. *Id.*

47. *Id.*

48. *Id.*

But his work, it seems clear, remained entirely within that tradition. While he utilized the tradition creatively in fashioning solutions for pressing legal problems, he did not feel himself free to break its bonds.

A. *The Historical Grounding of Justice Mitchell's Common Law Jurisprudence*

Like the best writers in the tradition of the common law and historical jurisprudence, Justice Mitchell recognized both the necessity that common-law reasoning be historically grounded and the possibility that common-law principles were capable of expansion, modification, and growth. Writing in dissent in *Cigar Makers Protective Union v. Conhaim*, Mitchell declared: “[I]t is one of the chief excellencies of the common law that its principles are capable of application to new conditions as they arise . . . .”<sup>49</sup> And in *National Benefit Co. v. Union Hospital Co.*, Mitchell asserted that the common-law teaching on contracts in restraint of trade had to be understood historically:

Formerly in England the courts frowned with great severity upon every contract [in restraint of trade]. The reasons for this partly grew out of the English law of apprenticeship, by which, in its original severity, no person could exercise any regular trade or handicraft except after having served a long apprenticeship . . . . Hence, if a person was prevented from pursuing his particular trade, he was practically deprived of all means of earning a livelihood, and the state was deprived of his services. No such reason now obtains in this country, where every citizen is at liberty to change his occupation at will. Moreover, as cheaper and more rapid facilities for travel and transportation gradually changed the manner of doing business, so as to enable parties to conduct it over a vastly greater territory than formerly, the courts were necessarily compelled to readjust the test or standard of the reasonableness of restrictions as to place. And again, modern investigations have much modified the views of courts as well as political economists as to the effect of contracts tending to reduce the number of competitors in any particular line of business. Excessive competition is not now . . . necessarily conducive to the

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49. 40 Minn. 243, 248, 41 N.W. 943, 946 (1889) (Mitchell, J., dissenting).

public good. The fact is that the early common-law doctrine in regard to contracts in restraint of trade largely grew out of a state of society and of business which has ceased to exist, and hence the doctrine has been much modified, as will be seen by comparison of the early English cases with modern decisions,—both English and American. A contract may be illegal on grounds of public policy because in restraint of trade, but it is of paramount public policy not lightly to interfere with freedom of contract.<sup>50</sup>

Justice Mitchell's stance on the need to move beyond the classic formulations of the English common law on restraint of trade was a controversial position to take in late nineteenth-century America as many lawyers and policy-makers came to view monopolistic practices as harmful to the economic interests of substantial portions of the American public.<sup>51</sup> But Justice Mitchell's reasoning on behalf of taking a fresh look at the law of contracts in restraint of trade, given changes in economic circumstance, is of a piece with the historically grounded reasoning advocated by men like Carter, or even, classically, Sir Matthew Hale. Fidelity to the past was important because it served as a starting point for analysis; but one was not necessarily tied to the decision-making of the past, where the court felt needs of the time demanded something else.<sup>52</sup>

Like other great common-law judges and writers, such as

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50. 45 Minn. 272, 275-76, 47 N.W. 806, 807 (1891).

51. See David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1219-21, 1224-30 (1988). Mitchell's argument, in fact, anticipates the United States Supreme Court's own narrowing of the antitrust statutes through the Rule of Reason Doctrine. *Id.* at 1220-21 (explaining the Rule of Reason).

52. At times, however, despite his own misgivings, Justice Mitchell felt constrained by the common-law rule. *Kremer v. Chicago, Milwaukee & St. Paul Railway Co.* involved an action to recover possession of a strip of land over which the defendant Railway apparently laid its track. 54 Minn. at 157, 55 N.W. at 928 (1893). Plaintiff prevailed at trial and was awarded damages to compensate for the taking that had occurred. *Id.* The railway then moved for a second trial. *Id.* Mitchell held in favor of the motion despite serious reservations:

The right to a second trial in actions for the recovery of real property is a relic of the fictions of the old common-law action of ejectment, which had their foundation, in part, at least, in the old feudal idea that the title to real property is too sacred to be concluded by the result of one trial, or even one action, which, in my judgment, has no justification for its continued existence . . . . But we see no way of preventing this under the statute as it now exists.

*Id.* at 161, 55 N.W. at 929.

Cooley, Carter, and Cardozo, Mitchell understood that the common law was not a static and unchanging body of rules.

We recognize the fact that the common law is not a code of cast-iron rules, but a system of principles capable of being applied to new conditions as they arise; and when a case arises which falls within a recognized legal principle the fact that it is new in instance will not and ought not to stand in the way of the courts applying the principle.<sup>53</sup>

But this case also illustrates the limits which Justice Mitchell was willing to place upon common-law creativity. A husband had separated from his wife, but subsequently wrote to her seeking a reconciliation.<sup>54</sup> Western Union failed to convey the wife's affirmative reply in a timely fashion and the man sued for the mental distress this delay caused him.<sup>55</sup>

Mitchell conceded that telegraphs presented a novel form of communication and that Western Union did, indeed, cause the plaintiff to suffer acute distress.<sup>56</sup> But the allowance of a cause of action for mental distress seemed too large a departure from the common-law tradition to countenance.<sup>57</sup> Courts were not really free to violate common-law principles:

Courts have no more right thus to abrogate the common law than they have to repeal the statutory law. The principles of the common law were founded upon practical reasons, and not upon a theoretical logical system; and usually, when these principles have been departed from, the evil consequences of the departure have developed what these reasons were. The truth is, once depart from the old rule, and we are all at sea, without either rudder or compass.<sup>58</sup>

Mitchell had no desire to create a rule "allowing damages for mental suffering resulting from the nondelivery of a telegraph message."<sup>59</sup> Texas had established such a rule and the Texas decision opened a "vast field of speculative litigation."<sup>60</sup> Mitchell's fear of judicial mischief was too strong to permit him to subject the

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53. *Francis v. W. Union Tel. Co.*, 58 Minn. 252, 265, 59 N.W. 1078, 1081 (1894).

54. *Id.* at 258, 59 N.W. at 1078.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 262, 59 N.W. at 1080 (citation omitted).

60. *Id.* at 263, 59 N.W. at 1080 (citing *So Relle v. Tel. Co.*, 55 Tex. 308 (1881)).

Minnesota courts to the same kind of speculative traffic.

Reading these cases together, Justice Mitchell can be seen to favor development of law faithful to the first principles of the common law; but too great a departure from principles amounted to a radical break and could not be allowed. Where to draw the line was, for Mitchell, as it would have been for his seventeenth-century predecessors, a matter of art, and long exposure to the “artificial reason” of the law.

### *B. Common-Law Reasoning and Fundamental Rights*

In a day before the emergence of modern constitutional law and the application by means of the incorporation doctrine of the Bill of Rights to the states, a judge like Mitchell tended to look to the common law as a source of rights of the citizen against the state.

*Bardwell v. Anderson* involved a challenge to a Minnesota statute permitting service by publication in lieu of personal service in cases involving the foreclosure of real estate mortgages and the enforcement of mechanics’ liens.<sup>61</sup> In considering the validity of the challenge, Mitchell began with the common law:

Suffice it to say that, from the earliest days of the territory down at least to 1866, such substituted service [service by publication] in actions strictly judicial in their nature, and proceeding according to the course of the common law, was only allowed where the defendant could not be found within the state; personal service being, in accordance with the uniform rule and practice from time immemorial, required in all cases where the defendant could be found, and service made upon him, within the jurisdiction of the court.<sup>62</sup>

Mitchell focused in particular on the question of “whether it is competent for the legislature to authorize such service in such actions upon residents of the state personally present, and capable of being found, and personally served, within its jurisdiction.”<sup>63</sup> He responded by looking in particular to the definitions of the term and concept “due process of law,” as developed by the common law tradition.<sup>64</sup>

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61. 44 Minn. 97, 46 N.W. 315 (1890).

62. *Id.* at 98, 46 N.W. at 316.

63. *Id.* at 101, 46 N.W. at 317.

64. *Id.* at 101-04, 46 N.W. at 317-18.

Mitchell looked to the argument of Daniel Webster in the *Dartmouth College* case for his definition of due process: “The general law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.”<sup>65</sup> With this declaration as his guiding principle, Mitchell considered the types of action where personal notice was and was not required.<sup>66</sup> Personal service was not required in actions *in rem*, such as suits in admiralty.<sup>67</sup> In such cases, “the process of the court goes against the *thing* which is in the custody of the court, and technically the defendant.”<sup>68</sup> There was also a second class of cases, such as probate, or “the exercise of the right of eminent domain, [or] the exercise of the power of taxation,”<sup>69</sup> where “personal notice to persons interested in the subject or object of the proceedings has never been deemed necessary.”<sup>70</sup>

But actions *in personam*, which included actions to foreclose on mortgages, historically received different treatment by the common law.<sup>71</sup> In these cases, Mitchell asserted:

[F]rom the earliest period of English jurisprudence down to the present, as well as in the jurisprudence of the United States derived from that of England, it has always been considered a cardinal and fundamental principle that in actions *in personam* proceeding according to the course of the common law, personal service (or its equivalent, as by leaving a copy at his usual place of abode) of the writ, process or summons must be made on all defendants resident and to be found within the jurisdiction of the court.<sup>72</sup>

This did not mean that various forms of constructive service were never possible, but “that the right to resort to such constructive or substituted service in personal actions proceeding according to the course of the common law rests upon the necessities of the case, and has always been limited and restricted to cases where personal service could not be made.”<sup>73</sup>

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65. *Id.* at 101-02, 46 N.W. at 317 (quoting Daniel Webster, argument of counsel, Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 517, 581 (1819)).

66. *Id.* at 102, 46 N.W. at 317.

67. *Id.*

68. *Id.* (emphasis added).

69. *Id.*

70. *Id.*

71. *Id.* at 103, 46 N.W. at 318.

72. *Id.* at 103, 46 N.W. at 317.

73. *Id.* at 103, 46 N.W. at 318.

In this way, Mitchell used the ancient rights conferred by the common law as a means of restricting the power of the legislature. “Although the legislature may at its pleasure provide new remedies or change old ones, the power is nevertheless subject to the condition that it cannot remove certain ancient landmarks, or take away certain fundamental rights which have been always recognized and observed in judicial procedures.”<sup>74</sup> The common law itself thus became, at the hands of an expert practitioner like Mitchell, the source of rights that the positive legislative acts of a legislature could not contravene.

### C. *Trial By Jury and Judicial Restraint*

Mitchell not only used the categories of the common law as a means of restraining legislative power, he used it as a means of restraining the power of the courts as well. *Lommen v. Minneapolis Gaslight Co.* involved a challenge to a statute establishing the ground rules by which a “struck” or special jury might be constituted.<sup>75</sup> The adoption of the struck jury in a large number of states in nineteenth-century America was in emulation of English reforms of the eighteenth century.<sup>76</sup> English statutes of the early eighteenth century treated the terms “special jury” and “struck jury” as synonymous.<sup>77</sup>

The term “struck jury” came into use in England because of the method employed in assembling the jury: “[T]he formation procedure, allowing each party to strike twelve prospective jurors from a panel of forty-eight names, was the consistent distinctive characteristic.”<sup>78</sup> The purpose behind the adoption of the struck jury system in the nineteenth-century United States was to give “the parties some degree of control over jury composition that they otherwise would not have had.”<sup>79</sup> The system was typically employed in order to facilitate informed decision-making,<sup>80</sup>

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74. *Id.* at 102, 46 N.W. at 317.

75. 65 Minn. 196, 68 N.W. 53 (1896).

76. The history of the struck or special jury is traced by James Oldham. See James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137 (1983); James C. Oldham, *The History of the Special (Struck) Jury in the United States and Its Relation to Voir Dire Practices, the Reasonable Cross-Section Requirement, and Peremptory Challenges*, 6 WM. & MARY BILL RTS. J. 623 (1998).

77. Oldham, *Origins*, *supra* note 76, at 176.

78. *Id.*

79. Oldham, *History*, *supra* note 76, at 652.

80. See *id.* at 671.

although it has come under fire today because it can frustrate the goal of assembling a jury that reflects a cross-section of the community, thereby enhancing the possibility that racial animus might play a role in jury composition.<sup>81</sup>

The Minnesota statute at issue reflected English practice and was typical of many of the statutes of its day. Parties to litigation were empowered to make a demand for a special jury with the clerk of courts,<sup>82</sup> the sheriff was then required to assemble forty persons judged by the sheriff to be the “most indifferent between the parties, and the best qualified to try such issue,”<sup>83</sup> the parties themselves were then allowed to strike twelve names each,<sup>84</sup> and the jury would consist of the first twelve of the sixteen remaining persons to appear at the courthouse.<sup>85</sup> The statute was challenged as being in violation of the state constitution, as impermissible “class legislation . . . unequal in its operation,” and as “contrary to the American system of jury trial . . . .”<sup>86</sup>

Mitchell commenced his analysis of the statute by articulating a powerful defense of judicial restraint:

Inasmuch as the legislature is a co-ordinate branch of the government, the courts do not sit to review or revise their legislative action; and hence, if they hold an act invalid, it must be because the legislature has failed to keep within its constitutional limits. A court has no right to declare an act invalid solely on the ground of unjust or oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the constitution.<sup>87</sup>

But even though Mitchell decided the case on constitutional grounds, he nevertheless looked to the common law in order to give content to the constitutional guarantee of trial by jury. “What is ‘trial by jury’ to which the constitution refers?” Mitchell asked.<sup>88</sup> “The expression ‘trial by jury,’” Mitchell continued, “is as old as Magna Charta, and has obtained a definite historical meaning,

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81. *Id.* at 671-75.

82. *See* Lommen v. Minneapolis Gaslight Co., 65 Minn. 196, 206, 68 N.W. 53, 53 (1896).

83. *Id.*

84. *Id.*

85. *Id.* at 207, 68 N.W. at 53.

86. *Id.* at 207, 68 N.W. at 54.

87. *Id.*

88. *Id.* at 209, 68 N.W. at 55.

which is well understood by all English-speaking peoples; and, for that reason, no American constitution has ever assumed to define it. We are therefore relegated to the history of the common law.”<sup>89</sup>

Reviewing the history of the jury, Mitchell found three elements to be absolute: “The essential and substantive attributes or elements of jury trial are and always have been number, impartiality, and unanimity. The jury must consist of 12; they must be impartial and indifferent between the parties; and their verdict must be unanimous.”<sup>90</sup> These characteristics were themselves fixed by the common law.

The statute in question cannot be said, Mitchell observed, to violate either the requirement of number or unanimity.<sup>91</sup> If the struck jury violated any of these elements, it must be impartiality.<sup>92</sup> Impartiality, Mitchell noted, might be implicated by two aspects of the statute: the possibility that the sheriff may wish to “pack” the jury;<sup>93</sup> and the absence of a procedure for lodging peremptory challenges, aside from the procedure for striking jurors.<sup>94</sup>

Mitchell answered these concerns through an appeal to the history of the common law. In fact, Mitchell noted, struck juries have their origin not in a desire to pack jury panels but to ensure impartiality: “The main object of special juries was protection against packed or incompetent common juries.”<sup>95</sup> England, furthermore, even at the time Mitchell wrote, did not recognize peremptory challenges.<sup>96</sup> Neither element, therefore, seemed essential to ensure impartiality.

Furthermore, Mitchell observed, many of the states of the Union have employed special juries. “[T]he Middle and Southern states seem generally to have recognized special juries as an existing common-law institution, and to have commenced to regulate it by statute at an early day.”<sup>97</sup> New York thus adopted the special jury in 1801 and Georgia in 1799.<sup>98</sup> Mitchell asserted:

Under all of these statutes . . . the method of selecting the

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89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 210, 68 N.W. at 55.

93. *Id.*

94. *Id.* at 211, 68 N.W. at 55.

95. *Id.* at 212, 68 N.W. at 55.

96. *Id.* at 211, 68 N.W. at 55.

97. *Id.* at 212, 68 N.W. at 56.

98. *Id.* at 212-13, 68 N.W. at 56.

jury was, in all essential particulars, the same as under our statute, and as at common law in England. Most, if not all, of these statutes, were enacted in the several states after the adoption of their constitutions, containing the same or similar provisions as to the right of the trial by jury which are contained in the constitution of Minnesota; and yet, until the present case, the constitutionality of these statutes has never, so far as we can discover, been even questioned, except once . . . . Struck or special juries, and the present mode of selecting them, had been known to and recognized by the law, as being in accordance with the common-law right of trial by jury, for ages before the adoption of the constitution of this state. It is rather late in the day to discover the unconstitutionality of such acts; and it would certainly require great temerity for courts now to assume to have discovered some new ground on which to hold them invalid.<sup>99</sup>

Mitchell concluded by agreeing with counsel that the struck jury presented the occasion for abuse, but responded by returning to the theme of judicial restraint:

Counsel has much to say about abuses that have grown up by reason of collusion between dishonest litigants and friendly or corrupt sheriffs; but, if such abuses have grown up, this is an argument to address to the legislature, rather than to the courts. All laws are subject to be abused by corrupt and dishonest men.<sup>100</sup>

Mitchell thus concluded where he had commenced: the proper spheres of competence of legislature and judiciary. In between, he sketched out in magnificent detail the common-law foundations of the right to trial by jury, identifying in the process the three inalienable elements: number, impartiality, unanimity. Provided these elements were preserved, he was willing to allow the legislature to regulate the details. So much had been allowed in England, and so much would be permitted in Minnesota.

#### *D. Sunday Closing Laws*

Sunday closing laws were a feature of American law almost from the beginning of English colonial efforts in the New World. Seventeenth-century English sabbatarian legislation generally

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99. *Id.* at 214, 68 N.W. at 56-57.

100. *Id.* at 215, 68 N.W. at 57.

applied to the colonies as well as to the mother country.<sup>101</sup> The newly independent states generally reiterated variations of these legislative schemes and enacted new ones.

From an early date in American legal history, challenges were raised to such legislation as representing infringements on religious freedom.<sup>102</sup> In upholding the legislation, judges tended to rely upon overt appeals to Christianity. *Commonwealth v. Wolf* thus involved the prosecution of a Jew who observed a Saturday sabbath and who contended that the Decalogue's injunction that "six days shalt thou labor and do all that thou has to do" required him to labor on Sunday.<sup>103</sup> Purporting to interpret both Christian commandment and Jewish Talmud, the Court declared that "[i]t is of the utmost moment . . . that [the people] should be reminded of their religious duties at stated periods."<sup>104</sup> The freedom of conscience guaranteed by the commonwealth's constitution "was never intended to shelter those persons, who, out of mere caprice, would directly oppose those laws for the pleasure of showing their contempt and abhorrence of the religious opinions of the great mass of the citizens."<sup>105</sup>

This reasoning was part and parcel of a belief that the Christian religion itself constituted part of the common law.<sup>106</sup> "In his inaugural address as Dane Professor of Law at Harvard University, [Joseph] Story elaborated on this claim: 'One of the beautiful boasts of our municipal jurisprudence is, that Christianity is a part of the common law, from which it seeks the sanctions of its

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101. See Andrew J. King, *Sunday Law in the Nineteenth Century*, 64 ALB. L. REV. 675, 682-83 (2000). See also WINTON U. SOLBERG, *REDEEM THE TIME: THE PURITAN SABBATH IN EARLY AMERICA* (1977).

The new doctrine of the Sabbath which emerged in England at the turn of the seventeenth century was influential throughout various strata of society at the time the colonization of America began. Englishmen carried the theory to all the original American settlements, and the growth of Sabbatarianism in many different geographical areas and social structures demonstrated the powerful force of Puritan ideology in molding early American culture.

*Id.* at 85.

102. King, *supra* note 101, at 688-97.

103. 3 Serg. & Rawle 48, 50 (Pa. 1817).

104. *Id.* at 51.

105. *Id.*

106. See Charles J. Reid, Jr., *The Religious Conscience and the State in U.S. Constitutional Law, 1789-2001*, in RELIGION RETURNS TO THE PUBLIC SQUARE: FAITH AND POLICY IN AMERICA 63, 68-69 (Hugh Hecló & Wilfred M. McClay eds., 2003).

rights, and by which it endeavors to regulate its doctrines.”<sup>107</sup>

Nineteenth-century claims that Christianity constituted a part of the common law were advanced for a variety of reasons. Story “located Christianity as ‘lying at [the] foundations’ of the common law,” and viewed the relationship as essential for protecting the sanctity of oaths and contracts.<sup>108</sup> Daniel Webster asserted that “general, tolerant Christianity, is the law of the land,” by which he meant it was the common repository of moral guidance for the broad mass of the people.<sup>109</sup> Only after the Civil War, in 1868, did a judicial opinion challenge the maxim that Christianity was a part of the common law by pointing out that it “[was] a relic of the time when the clergy ruled England . . . .”<sup>110</sup>

The Minnesota statute at issue in *State v. Petit* seems to have been part of a general post-Civil-War trend in favor of Sunday closing laws, justified not so much on strictly religious grounds as on the public necessity of providing a generally accepted day of rest.<sup>111</sup> Liberal Protestant writers sought to frame Sabbatarian arguments in inclusive language, justifying enforced Sunday rest “as a human institution,”<sup>112</sup> beneficial to the growth of culture and the refreshment of the people.<sup>113</sup> Sunday became a day of “[e]xcursions, rides, and drives,” and general relaxation.<sup>114</sup>

The defendant in *State v. Petit* was arrested for opening his barber shop on a Sunday, and challenged the constitutionality of the law.<sup>115</sup> It was, he said, a violation of the state’s police power and “class legislation,” by which he meant a kind of equal protection claim: the state had discriminated against barber shops in specifically directing them to close on Sundays although at the same time allowing for “the works of necessity or charity.”<sup>116</sup> Who was to say whether a shave and a haircut was not a charitable

107. *Id.* at 68 (quoting THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 517 (William W. Story ed. 1852)).

108. Stuart Banner, *When Christianity Was Part of the Common Law*, 16 LAW & HIST. REV. 27, 49-50 (1998).

109. *Id.* at 51.

110. *Id.* at 47 (quoting *Hale v. Everett*, 53 N.H. 1, 209 (1868) (Doe, J., dissenting)).

111. See ALEXIS McCROSSEN, *HOLY DAY, HOLIDAY: THE AMERICAN SUNDAY* 51-78 (2000).

112. *Id.* at 55.

113. See *id.* at 55-58.

114. *Id.* at 79.

115. 74 Minn. 376, 378-79, 77 N.W. 225, 226 (1898).

116. *Id.*

enterprise?

Justice Mitchell acknowledged that other jurisdictions had rested their affirmations of Sunday closing laws on the relationship of Christianity and the common law: "In some states it has been held that Christianity is part of the common law of this country, and Sunday legislation is upheld, in whole or in part, upon that ground."<sup>117</sup> Mitchell, however, preferred another foundation:

Even if permissible, it is not necessary to resort to any such reason to sustain such legislation. The ground upon which such legislation is generally upheld is that it is a sanitary measure, and as such a legitimate exercise of the police power. It proceeds upon the theory, entertained by most of those who have investigated the subject, that the physical, intellectual, and moral welfare of mankind requires a periodical day of rest from labor, and, as some particular day must be fixed, the one most naturally selected is that which is regarded as sacred by the greatest number of citizens, and which by custom is generally devoted to religious worship, or rest and recreation, as this causes the least interference with business or existing customs.<sup>118</sup>

Mitchell acknowledged a kind of natural impulse, a fundamental human necessity, to seek regular time off from one's labor.<sup>119</sup> Mitchell thus wrote: "It is sometimes said that mankind will seek cessation of labor at proper times by the natural influences of the law of self-preservation."<sup>120</sup>

Mitchell rejected the claim of those who asserted that Sunday closing laws interfered with the right to work: "Labor is in a great

117. *Id.* at 379, 77 N.W. at 226.

118. *Id.*

119. *New York Times* writer Judith Shulevitz, having recently returned to her Jewish roots, has written in praise of the Sabbath:

The Israelite Sabbath institutionalized an astonishing, hitherto undreamed-of notion: that every single creature has the right to rest, not just the rich and the privileged. Covered under the Fourth Commandment are women, slaves, strangers and, improbably, animals. The verse in Deuteronomy that elaborates on this aspect of the Sabbath repeats, twice, that slaves were not to work, as if to drive home what must have been very hard to understand in the ancient world.

Judith Shulevitz, *Bring Back the Sabbath*, N. Y. TIMES, Mar. 2, 2003, at 50. Shulevitz continues: "Do I think everyone else should observe a Sabbath? I believe it would be good for them, and even better for me, since the more widespread the ritual, the more likely I am to observe it." *Id.*

120. *Petit*, 74 Minn. at 379, 77 N.W. at 226.

degree dependent upon capital, and, unless, the exercise of power which capital affords is restrained, those who are obliged to labor will not possess the freedom for rest which they would otherwise exercise.”<sup>121</sup>

The Sunday closing laws were thus necessary to protect those vulnerable to financial pressures:

The object of the law is not so much to protect those who can rest at pleasure as to afford rest to those who need it, and who, from the conditions of society, could not otherwise obtain it. Moreover, if the law was not obligatory upon all, and those who desired to do so were permitted to engage in their usual avocation on Sunday, others engaged in the same kind of labor or business might, against their wishes, be compelled, by the laws of competition in business, to do likewise.<sup>122</sup>

The truth was, Mitchell acknowledged, “that all men are not in fact independent and at liberty to work when they choose.”<sup>123</sup>

It was an easy step, from this premise, for Mitchell to conclude that the legislature acted within the scope of its police powers in determining whether the operation of a barbershop was or was not a work of charity or necessity requiring Sunday business hours.<sup>124</sup> He reached this conclusion by sidestepping the contention, unremarkable in Joseph Story’s day but controversial in his own, that Christianity formed a part of the common law.<sup>125</sup>

#### *E. The Common Law and the Proper Disposal of the Dead*

*Larson v. Chase* involved a lawsuit occasioned by the defendant’s unauthorized dissection of the body of the plaintiff’s deceased husband.<sup>126</sup> The law of burial in nineteenth-century America was in the process of coming to terms with a rather mixed set of antecedents. In England, historically, jurisdiction over burial was divided between the courts of common law and the ecclesiastical courts. In a statement destined to be repeated many times by American courts, Sir Edward Coke wrote:

It is to be observed that, in every sepulcher that hath a

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121. *Id.* at 380, 77 N.W. at 226.

122. *Id.*

123. *Id.* at 379, 77 N.W. at 226.

124. *Id.* at 381, 77 N.W. at 227.

125. *See id.*

126. 47 Minn. 307, 50 N.W. 238 (1891).

monument, two things are to be considered, viz., the monument, and the sepulture or buriall of the dead. The buriall of the cadaver (that is *caro data vermibus*) [flesh given to worms] is *nullius in bonis* [a nullity in property], and belongs to ecclesiasticall cognisance, but as to the monument, action is given . . . at the common law for the defacing thereof.<sup>127</sup>

Such a division of competences was workable in nineteenth-century England, which still maintained a series of ecclesiastical courts that exercised real coercive powers. It was unworkable, however, in a United States where ecclesiastical courts could not exercise the same authority.

Among the most important nineteenth-century decisions on the subject of burial was the opinion rendered in 1856 by Samuel Ruggles, a special master appointed by the New York Court of Chancery to determine the compensation owed to a church and its congregation for the removal of its cemetery so as to make room for a street widening.<sup>128</sup> Viewing his role as special master as an opportunity to remake American burial law, Ruggles placed a series of limitations on Coke's teaching. Coke, Ruggles observed, was motivated by a desire to expand and secure common-law jurisdiction *vis à vis* the ecclesiastical courts.<sup>129</sup> His etymology of the word "cadaver" as "flesh given to worms" was incorrect. The Latin did not support such a derivation.<sup>130</sup> The law, furthermore, did not consign the corpse to the worms but entrusted its care to the Church.<sup>131</sup> These factors limited Coke's teaching to its English context. The American situation was very different.

Ruggles insisted that even though the English common law, because of its shared jurisdiction with the ecclesiastical courts, did not extend legal protection to human remains, the American courts, given their different circumstances, should extend such protection:

The establishment of a right so sacred and precious,

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127. EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 203 (1817) (London: E. & R. Brooke 1797).

128. See *In re Widening of Beekman St.*, 4 Bradf. Sur. 503 (N.Y. Sup. Ct. 1856). On the importance of this case, see Charles J. Reid, Jr., "The Body of the Human Person in American Law: Sacred Receptacle of the Holy Spirit or Marketable Commodity?" 25-37 (unpublished paper, on file with author).

129. See *Beekman St.*, 4 Bradf. Sur. at 520.

130. *Id.*

131. *Id.* at 520-21.

ought not to need any judicial precedent. Our courts of justice should place it at once, where it should fundamentally rest for ever, on the deepest and most unerring instincts of human nature; and hold it to be a self-evident right of humanity, entitled to legal protection, consideration of feeling, decency, and Christian duty.<sup>132</sup>

That Justice Mitchell had this opinion in mind when crafting the *Larson* opinion is clear from his citation to it.<sup>133</sup> The plaintiff in *Larson*, the decedent's widow, alleged that her late husband's body had been "mutilated" and "dissect[ed]" without her permission, and sought damages on the basis of "mental suffering and nervous shock."<sup>134</sup> Mitchell ruled in her favor, and in the process produced a sophisticated, historically grounded analysis of the rights of family members to the earthly remains of loved ones.

Following Ruggles' reasoning, Mitchell commenced:

Upon the questions who has the right to the custody of a dead body for the purpose of burial, and what remedies such person has to protect that right, the English common-law authorities are not very helpful or particularly on point, for the reason that from a very early date in that country the ecclesiastical courts assumed exclusive jurisdiction of such matters.<sup>135</sup>

American lawyers and judges, however, because of the absence of ecclesiastical courts, were required to create a new rule.<sup>136</sup> The creative process was initially a confusing one: "Inclined to follow the precedents of the English common law, these courts were at first slow to realize the changed condition of things, and the consequent necessity that they should take cognizance of these matters and administer remedies as in other analogous cases."<sup>137</sup> Mitchell subtly expressed gratitude to unnamed predecessors as he

132. *Id.* at 529.

133. *Larson v. Chase*, 47 Minn. 307, 50 N.W. 238 (1891).

Time will not permit, and the occasion does not require, us to enter into any extended discussion of the history of the law, civil, common, or ecclesiastical, of burial and the disposition of the body after death. A quite full and interesting discussion of the subject will be found in the report of the referee . . . .

*Id.* at 308, 50 N.W. at 238 (citing Hon. S.B. Ruggles, *Beekman St.*, 4 Bradf. Sur. 503).

134. *Id.*

135. *Id.*

136. *Id.* at 308-09, 50 N.W. at 238. "The repudiation of the ecclesiastical law and of ecclesiastical courts by the American colonies left the temporal courts the sole protector of the dead, and of the living in their dead." *Id.*

137. *Id.* at 309, 50 N.W. at 238.

stated what he described as “[t]he general, if not universal doctrine” that first spouses, then next of kin, should exercise responsibility for the proper burial of the dead.<sup>138</sup>

That Mitchell cited no authority for this statement of the “general” rule is testimony to his own creative skills. The degree to which he innovated can be gauged by his invocation of “common custom,” “sentiment,” and “reason.” “[The rights of spouse or next-of-kin over the body] is in accordance, not only with common custom and general sentiment, but also, as we think, with reason.”<sup>139</sup> Mitchell continued, “this right, is in the nature of a sacred trust, in the performance of which all are interested who were allied to the deceased by the ties of family or friendship . . . .”<sup>140</sup>

Mitchell then cited and quoted from Sir Edward Coke’s dictum that there could be no property interest in a corpse.<sup>141</sup> He reiterated his criticism of Coke’s teaching, noting that it was “severed from its context.”<sup>142</sup> Further qualifying Coke’s dictum, Mitchell added:

[I]t will be observed that it is not asserted that no individual can have any legal interest in a corpse, but merely that the burial is *nullius in bonis*, which was legally true at common law at that time, as the whole matter of sepulture and custody of the body after burial was within the exclusive cognizance of the ecclesiastical courts.<sup>143</sup>

Mitchell did not want to pursue to its logical conclusion the proposition that one might have a property interest in a corpse. Such reasoning might introduce an impermissible degree of commercialism into an aspect of human life Mitchell clearly considered sacred.<sup>144</sup> Nevertheless, Mitchell asserted, it was the rule “that those who are entitled to the possession and custody of [the body] for purposes of decent burial have certain legal rights in it, which the law recognizes and will protect.”<sup>145</sup> Indeed, even in the

138. *Id.* at 309, 50 N.W. at 238-39.

139. *Id.* at 309, 50 N.W. at 239.

140. *Id.*

141. *Id.* Cf. COKE, *supra* note 127 and accompanying text (providing the quotation).

142. *Larson*, 47 Minn. at 310, 50 N.W. at 239.

143. *Id.*

144. *Id.* “[I]t may be true still that a dead body is not property in the common commercial sense of that term . . . .” *Id.*

145. *Id.*

absence of a specific property right, the plaintiff's "interest" was sufficiently strong to support a claim for damages.<sup>146</sup>

Mitchell then turned his attention to the nature of the damages the plaintiff was entitled to seek. He conceded that while it was "elementary that while the law as a general rule only gives compensation for actual injury . . .,"<sup>147</sup> it is always the case that at least nominal damages will be awarded for the violation of rights.<sup>148</sup> "Every injury imports a damage," Mitchell declared.<sup>149</sup>

Mitchell then considered whether mental suffering, "as a distinct element of damage," might ever be the subject of damages.<sup>150</sup> Where a legal right has been infringed, Mitchell expressed a willingness to allow damages for mental distress in the appropriate circumstances:

'[F]or the law to furnish redress there must be an act which, under the circumstances, is wrongful; and it must take effect upon the person, the property, or some other legal interest, of the party complaining. Neither one without the other is sufficient.' This is but another way of saying that no action for damages will lie for an act which, though wrongful, infringed no legal right of the plaintiff, although it may have caused him mental suffering. But, where the wrongful act constitutes an infringement of a legal right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act.<sup>151</sup>

Mitchell then brought the rule he had just enunciated home to the case at bar: "That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated is too plain to admit of argument."<sup>152</sup> The offense to be compensated, Mitchell concluded, was "the indignity to the dead."<sup>153</sup>

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146. *Id.* "[W]e think it may be safely laid down as a general rule that an injury to any right recognized and protected by the common law will, if the direct and proximate consequence of an actionable wrong, be a subject for compensation." *Id.*

147. *Id.* at 310, 50 N.W. at 239.

148. *Id.* at 311, 50 N.W. at 239.

149. *Id.*

150. *Id.*

151. *Id.* at 311, 50 N.W. at 239-40.

152. *Id.* at 312, 50 N.W. at 240.

153. *Id.* The result in this case can be distinguished from *Francis v. Western Union Telegraph* in that Mitchell concluded in the latter case that the plaintiff lacked a legally cognizable right to be compensated for the mental anguish caused by the nondelivery of a telegram. 58 Minn. 252, 59 N.W. 1078 (1894). As Mitchell acerbically put it, he

## IV. CONCLUSION

To appreciate William Mitchell's creativity, one must recapture the essence of what it meant to be a common-law judge in late nineteenth-century America. It was an era that placed great faith in the possibility that judges, relying upon tradition and precedent, might fashion novel solutions for the time. As Benjamin Cardozo, the final and greatest of the common-law judges, described the process in 1921, it was experimental, embracing the community of judges and lawyers and extending over the generations.<sup>154</sup> Where "there is no decisive precedent," where the various parties in the case before the bench can all present plausible claims, it belongs to the judge to select among competing principles those best tailored to reach a just result.<sup>155</sup>

"The common law," Cardozo stressed, "does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars."<sup>156</sup> Quoting from Munroe Smith, Cardozo continued:

The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered.<sup>157</sup>

This description fairly matches the sort of method one discerns at work in Mitchell's judicial opinions. His concern preeminently was with the doing of justice in particular cases, even while remaining solidly grounded within the common-law tradition.

It would be anachronistic, painfully anachronistic, to try to fit Mitchell's jurisprudence within conventional contemporary

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did not wish to carve out an exception from a general rule for what he pejoratively termed "telegraph cases." *Id.* at 262, 59 N.W. at 1080. He preferred to follow the general rule "that damages for mental suffering resulting from a breach of contract is wholly unknown to and unauthorized by the common law . . ." *Id.* Tortious "indignity to the dead" simply fell into a different category of law governed by different rules of damages. *Larson*, 47 Minn. at 312, 50 N.W. at 240.

154. See BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 21-23 (Colonial Press 1960) (1921).

155. *Id.* at 21.

156. *Id.* at 22-23.

157. *Id.* at 23 (quoting MUNROE SMITH, *JURISPRUDENCE* 21 (1909)).

stereotypes of left or right. Clearly, in the course of his long judicial career, he produced opinions that might be described variously as progressive or as conservative. He apprehended the coercive powers of large pools of capital on vulnerable workers.<sup>158</sup> He thus upheld Sunday closing laws as a surrogate for other forms of restricting the numbers of hours worked by employees.<sup>159</sup> But he endorsed with equal enthusiasm an innovative reading of the common-law tradition on restraints of trade that allowed for the emergence of monopolies.<sup>160</sup>

Was there a principled coherence to Mitchell's decision-making? Or was he a results-oriented jurist, deciding cases on the bases of hunches that changed over the years, or even from case to case?

The coherence, it seems, lies in Mitchell's own fidelity to the process of common-law, historical reasoning as described by Cardozo. Mitchell's invocation of the common law frequently presaged the fashioning of new rules, intended to improve upon the received learning, even while remaining faithful to first principles. Where he departed from the tradition, as he did with burial law, he did so because the context of the English common-law rule simply did not fit American circumstances. And it is this sort of case, sensitive both to the rule and to the context in which it was formulated, that characterized the kind of command he had over his legal sources. Indeed, it can be said that it is precisely in the mastery of his sources, in his appreciation of the text and context of his precedents, that Mitchell's greatness can be discerned.

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158. See *State v. Petit*, 74 Minn. 376, 77 N.W. 225 (1898).

159. See *id.*

160. See *Nat'l Ben. Co. v. Union Hosp. Co.*, 45 Minn. 272, 47 N.W. 806 (1891).